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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ALEXANDER GABAY,

Defendant and Appellant.

2d Crim. No. B157189
(Super. Ct. No. LA036762)
(Los Angeles County)

Appellant Alexander Gabay was tried before a jury and convicted of second degree murder with an enhancement for personally and intentionally discharging a firearm and causing death or great bodily injury. (Pen. Code, §§ 187, subd. (a), 189, 12022.53, subd. (d).)[1] He contends the judgment must be reversed because the trial court erroneously denied his request for an instruction on voluntary manslaughter as a lesser included offense. We conclude there was no substantial evidence to support the instruction and affirm the judgment.

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[1] All statutory references are to the Penal Code.

BACKGROUND

During the summer of 2000, appellant began dating Oxana Meshkova, who had recently immigrated from the Ukraine. Meshkova and several other young women had entered the country illegally, with the cost of their transportation paid by people who intended to recoup that money by employing them as prostitutes. Lyudamyla Petushenko had paid about $3,000 for Meshkova's transportation, but Meshkova refused to work as a prostitute and had not paid back the money she owed to Petushenko.

Meshkova learned that her close friend Vicka had been "sold" by Petushenko to a man who was treating her badly. Appellant agreed to help Meshkova find Vicka. On the morning of August 17, 2000, appellant's friend Marvin Graham drove appellant and Meshkova to Petushenko's apartment in North Hollywood because Meshkova wanted to get a telephone number where Vicka could be reached. Appellant and Meshkova went into the apartment while Graham waited in the car. Graham noticed that appellant was carrying a handgun on his waist.

When they returned to the car, Meshkova was very upset. Graham asked appellant what had happened and appellant said, "I shot her." Appellant also told Graham he had grabbed Petushenko by the throat because she was yelling at him. Appellant, Meshkova and Graham spent the rest of the day driving to different bars and getting drunk, but did not discuss the shooting again. Graham saw appellant put his gun under the passenger seat when they went into the first bar, but he took it back before they parted later that evening.

Petushenko's dead body was discovered by a friend of hers that afternoon. An autopsy revealed that she had died due to a single gunshot wound in her chest. She had severe trauma on her neck and head, which could only have been caused by very forceful blows. The coroner believed that if she had not died of the gunshot wound, she would have died from those injuries without immediate treatment.

A security video camera in Petushenko's apartment complex showed that appellant and Meshkova had entered the building at 9:03 a.m. and left at 9:23 a.m. When they left, appellant appeared to be holding a towel in his hand that he did not have when they entered the building. The police determined that appellant and Meshkova were the two people portrayed on the video tape and contacted them for questioning.

After learning that the police were looking for him, appellant dismantled the handgun that had been used in the shooting, a .45-caliber revolver, and melted down the barrel and some of its other parts. He gave the remaining usable parts, including the slide mechanism, to Graham.

Appellant also burned Petushenko's notebook, which contained addresses, telephone numbers, loose papers and a checkbook. He commented to Graham that he wanted to write a check on the account to get some cash. Police later recovered a $3,000 check that was written on Petushenko's checking account. It was made out to appellant's friend Cameron Crockett and had been deposited in Crockett's account two weeks after Petushenko's death.

Appellant and Meshkova eventually were interviewed by police. They initially denied even going to Petushenko's on the day of the shooting. Confronted with the videotape from the apartment complex, Meshkova told the police that appellant was the one who shot Petushenko. Appellant admitted that they went to Petushenko's apartment, but claimed she was still alive when they left. Appellant's apartment was searched, and police recovered a pair of men's sneakers with blood stains matching Petushenko's DNA.

Although appellant had warned Meshkova not to say anything about Graham, Meshkova told investigators that Graham had driven them to Petushenko's apartment. The police contacted Graham, who told them that appellant had been carrying a gun that day and had admitted shooting Petushenko. He gave the police the gun parts that appellant had given him. A firearms examiner determined that the

single .45-caliber shell casing found at the scene of the shooting had been discharged by a gun utilizing the slide mechanism provided by Graham.

Both appellant and Meshkova were initially charged with murder. Appellant was brought to trial, and Meshkova and Graham were granted immunity in exchange for their truthful testimony. As to the details of the killing, Meshkova testified as follows: Petushenko had invited them into the apartment when they knocked on her door. The two women went into the bedroom to talk, while appellant waited in the living room. After a loud argument, Petushenko agreed to give Vicka's telephone number to Meshkova. She was writing the number on a piece of paper when appellant suddenly entered the room and, without warning, kicked Petushenko in the head. Petushenko fell against the nightstand and Meshkova ran out the bedroom door. From the living room, Meshkova heard a loud sound and saw appellant walking out of the bedroom, tucking a handgun into his waistband. Meshkova looked back into the bedroom and saw Petushenko lying on the floor with blood on her body. Appellant used a towel to wipe the doorknobs and a few other surfaces for fingerprints. When they left the apartment, he was carrying a telephone book belonging to Petushenko.

Appellant testified and maintained that it was Meshkova who had beaten and killed Petushenko. According to appellant, he was waiting in the living room while the two women argued about Vicka's telephone number. When he went into the bedroom to see what was happening, Petushenko was lying unconscious on the floor and Meshkova was jumping up and down on her head. Appellant pulled Meshkova away and told her they had to leave. As he was walking out of the room, Meshkova grabbed a gun from her purse and shot Petushenko. The gun was one that appellant had given her for protection, and she carried it frequently. Appellant claimed he had no idea that Meshkova would shoot Petushenko. As they left the apartment, it was Meshkova who wiped down the various surfaces with a towel and took Petushenko's notebook.

Appellant acknowledged that he told Graham that he had shot Petushenko. He explained that he was trying to protect Meshkova and did not want Graham to know she was involved. Appellant testified that he had lied to the police, melted down the murder weapon and burned Petushenko's notebook for the same reason. Appellant acknowledged that he was a kick-boxer and would have been physically capable of inflicting Petushenko's head and neck injuries. He observed that Meshkova was a weight lifter and was herself quite strong.

DISCUSSION

Appellant requested instructions on voluntary manslaughter based on provocation and heat of passion as a lesser included offense.[2] We reject his claim that the trial court erred by refusing these instructions.

A defendant is entitled to an instruction on a lesser included offense when there is substantial evidence supporting the instruction. (See *People v. Breverman* (1998) 19 Cal.4th 142, 162.) "Substantial evidence" in this context is evidence sufficient to deserve consideration by the jury, that is, evidence from which a reasonable jury could conclude that the lesser offense, but not the greater, had been committed. (*People v. Lewis* (2001) 25 Cal.4th 610, 645; *Breverman*, at p. 162.)

Voluntary manslaughter under section 192, subdivision (a) is a lesser included offense of murder. (*People v. Breverman*, *supra*, 19 Cal.4th at p. 154.) The demarcation between the two types of homicide is malice aforethought. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) When the defendant possesses a state of mind that would otherwise constitute malice aforethought, but kills "upon a sudden quarrel or heat of passion," malice is presumed to be absent and the crime is voluntary manslaughter. (§ 192, subd. (a); *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.)

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[2] The other variant of voluntary manslaughter, based on an unreasonable but good faith belief in the need to defend oneself, is not at issue in this case.

The heat of passion required to negate malice and reduce a homicide from murder to voluntary manslaughter has both a subjective and an objective requirement. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) Strong feelings alone are insufficient. Rather, the killer's reason must be "actually obscured as the result of a strong passion aroused by a 'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."' [Citations.]" (*People v. Breverman*, *supra*, 19 Cal. 4th at p. 163.) Any violent, intense or highly wrought emotion other than revenge may satisfy the subjective component of heat of passion, but malice is only negated when the heat of passion arises from adequate provocation measured by the objective standard of the ordinarily reasonable person. (*Steele*, at pp. 1252, 1254; *Breverman*, p. 163.) Applying these principles, there was no substantial evidence that appellant had been reasonably provoked when he killed Petushenko.

Appellant's own testimony did not support a finding that he committed voluntary manslaughter. He claimed that he was in another room of the apartment when Meshkova began a violent and unplanned assault, and that he was trying to get Meshkova to leave when she pulled out a gun and unexpectedly shot Petushenko. This testimony, if believed by a jury, would have entitled him to acquittal on the murder charge, but it did not support a verdict of voluntary manslaughter. (See *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1019-1022.)

We acknowledge that appellant's testimony might have supported a finding that *Meshkova* killed Petushenko upon provocation and in the heat of passion. But this would not affect appellant's own culpability. The jurors were not instructed that appellant could be guilty as an aider and abettor of Meshkova's conduct, and even if they had been, the circumstance of provocation is one that benefits only the perpetrator who is actually provoked. (See *People v. McCoy* (2001) 25 Cal.4th 1111, 1121-1122 [aider and abettor who harbored malice may be properly convicted of second degree murder, even when perpetrator acts in heat of passion and is guilty

only of voluntary manslaughter; provocation does not negate aider and abettor's malice].) In any event, the jury's finding that appellant personally used a firearm shows that it rejected appellant's testimony that Meshkova was the killer.

Appellant argues that the trial court was required to instruct the jury on voluntary manslaughter notwithstanding his own description of the shooting. He relies primarily on *People v. Elize* (1999) 71 Cal.App.4th 605, which concluded that "a lesser included instruction is required even though the factual premise underlying the instruction is contrary to the defendant's own testimony, so long as there is substantial evidence in the entire record to support that premise." (*Id.* at p. 615.) We have no quarrel with this general principle, but it has no bearing here. Putting aside appellant's own testimony, there was no substantial evidence that the killing was voluntary manslaughter rather than murder.

The only other witness besides appellant to provide a firsthand account of the shooting was Meshkova, who testified that she was arguing with Petushenko when appellant suddenly entered the room and kicked and shot her without warning. Under this version of events, the killing was not preceded by any quarrel between appellant and Petushenko, and it was not the product of any provocative act on the part of Petushenko. Absent any suggestion of provocation by the victim, the killing could not have been voluntary manslaughter, even if the circumstances of the killing supported an inference that appellant was acting in a subjective heat of passion. (See *People v. Lee* (1999) 20 Cal.4th 47, 59.)

The only evidence suggesting that Petushenko provoked appellant in any way was appellant's statement to Marvin Graham that he had grabbed Petushenko by the throat because she was yelling at him. But Petushenko's yelling was not the sort of provocation that would "arouse a reasonable person to make the kind of sudden and devastating attack" made by appellant. (*People v. Waidla* (2000) 22 Cal.4th 690, 740, fn. 17.) This is true even when the yelling is considered against the backdrop of Petushenko's dispute with Meshkova and Petushenko's apparent

attempts to persuade Meshkova to become a prostitute. No defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless the circumstances were sufficient to arouse the passions of the ordinarily reasonable person. (*People v. Steele*, *supra*, 27 Cal.4th at pp. 1252-1253.)

The judgment is affirmed.

NOT TO BE PUBLISHED.

COFFEE, J.

We concur:

GILBERT, P.J.

PERREN, J.

Darlene E. Schempp, Judge

Superior Court County of Los Angeles

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